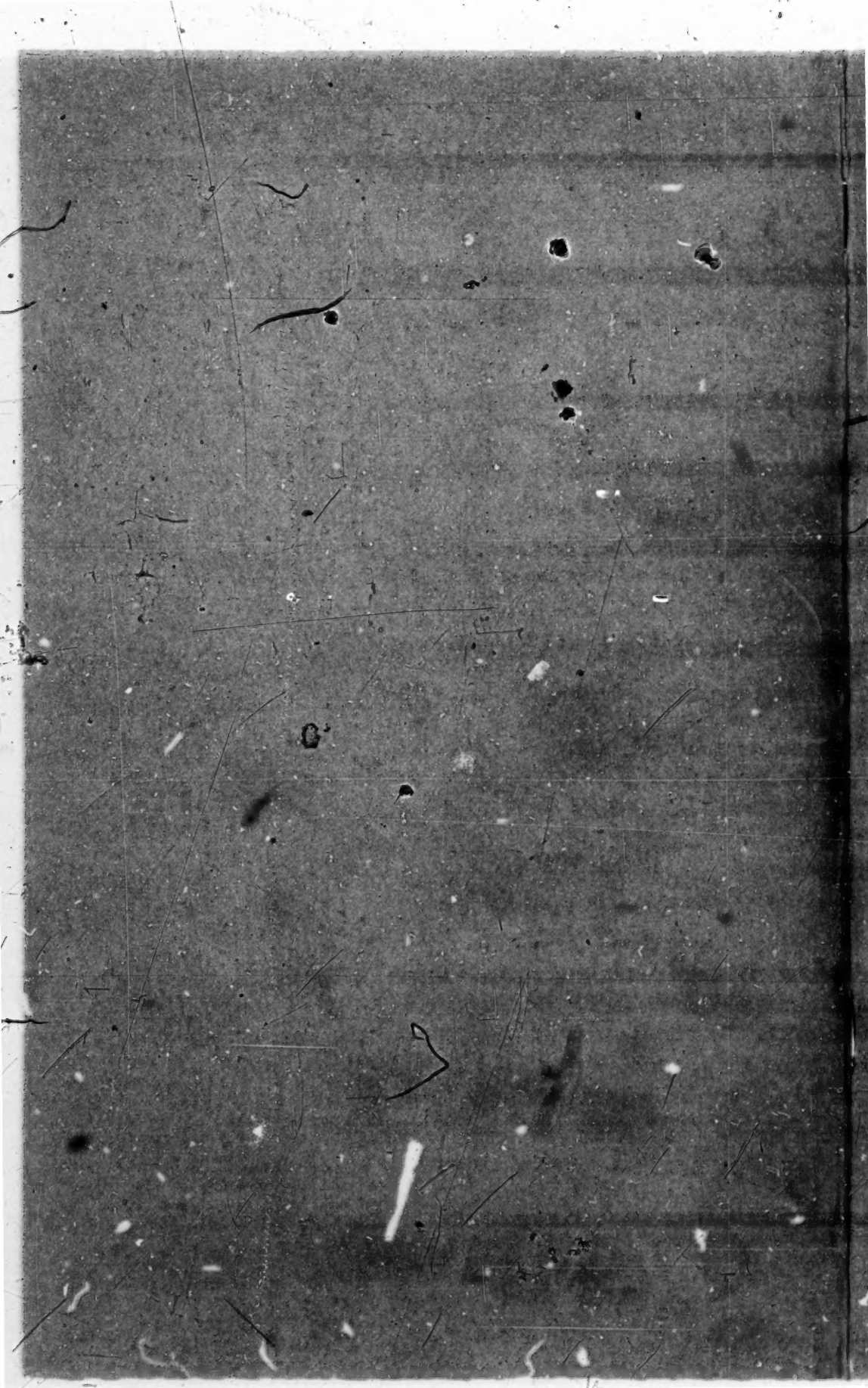

SUPREME COURT, U. S.
No. 503
MAY 13 1960
JAMES R. BROWNING, C

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

UNITED STATES OF AMERICA, *Petitioner*

v.

GRAND RIVER DAM AUTHORITY, *Respondent*

On Writ of Certiorari to the United States Court of Claims

BRIEF FOR RESPONDENT

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No. 503

UNITED STATES OF AMERICA, *Petitioner*

v.

GRAND RIVER DAM AUTHORITY, *Respondent*

On Writ of Certiorari to the United States Court of Claims

BRIEF FOR RESPONDENT

QUESTION PRESENTED

Respondent, Grand River Dam Authority, respectfully submits that the questions presented in petitioner's brief do not correctly state the issue in this case. The real question presented is:

Whether respondent's vested water and franchise rights, acquired under state law, in a non-navigable stream can be taken or destroyed by the United States without the payment of just compensation.

STATEMENT

In view of omissions in petitioner's statement, we believe it appropriate to make the following supplemental statement.

The Corps of Engineers of the United States Army completed feasibility studies of the Grand River in 1932. A report of these studies was published as House Document 308, 74th Congress, First Session. The study and report concluded that federal development of the lower reaches of the Grand River was not economically justified at that time. (Fdg. 3, R. 114).[1]

Following these studies and report, the State of Oklahoma, by legislative enactment, created the Grand River Dam Authority, a public corporation, for development of hydro-electric power on the Grand River. (Session Laws of Oklahoma, 1935, Chap. 70, Art. 4, p. 350 *et seq.*) This Act "appropriated to and vested in" the Authority all of the water power rights in the Grand River, together with the exclusive right and franchise to develop and use the waters for the produc-

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[1] The report specifically stated:

> "[T]here is no present or prospective income to be had from reservoired waters for public or private use other than that to be obtained from construction of power and water supply reservoirs, which should be developed by private capitals." House Doc. No. 308, 74th Cong., 1st Sess., at p. 1260.

In addition, this Document recommended "that there be no participation by the United States in the control of floods in the Grand (Neosho) River watershed" *Id.* at p. 1261.

tion of water power and electric energy and other beneficial purposes. *City of Tulsa* v. *Grand-Hydro*, District Court of Mayes County, Okl., Pl. Ex. 1, R. 91 at R. 101;[2] accord, *Grand River Dam Authority* v. *Grand-Hydro*, 335 U.S. 359, 362-64; Fdgs. 4-5, R. 114-16.

Respondent, Grand River Dam Authority, prepared a comprehensive plan for the storage and control of the waters of the Grand River, and its tributaries within the State of Oklahoma, in order to make beneficial use of such waters for the development and generation of electric power and energy. By 1939, respondent had developed a plan which contemplated the construction, maintenance and operation by respondent of three dam-and-reservoir projects on the Grand River, with hydro-electric generating units at the several projects. All were to constitute a single system functioning under unified control. The first of these projects was to be constructed at Pensacola, the second down-stream from Pensacola at Markham Ferry, and the third down-stream from Markham Ferry at Fort Gibson. Under the plan, the Pensacola project was to provide the principal headwater and power storage, and the installations at Markham Ferry and Fort

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[2] The decree in *City of Tulsa* v. *Grand-Hydro*, which is set out in full in the record (R. 91-105), found and adjudged as follows:

> "• • • no person, firm or corporation other than the Grand River Dam Authority has acquired since statehood the right to appropriate any of the waters of Grand River to a beneficial use; that Art. 4 of Chapter 70 of the 1935 Session Laws of the State of Oklahoma, which became effective on the 29th day of July, 1935, *appropriated to and vested in the Grand River Dam Authority*, the absolute right to control, store and preserve the waters of Grand River for the purposes set forth in said Act • • •." (Emphasis added) (R. 101).

Gibson were to be "run of the river" plants. The plan contemplated that the water stored at Pensacola would be used three times for the generation of electric power and energy: first, through the Pensacola unit; second, through the Markham Ferry unit; and then through the Fort Gibson unit. (Fdg. 6, R. 116-17).

The United States did not express any affirmative interest in the development of the Grand River until the Flood Control Act of August 18, 1941, 55 Stat. 638.

Prior to the enactment of the Flood Control Act of 1941, the Authority completed the construction of the Pensacola unit and completed plans for the Markham Ferry and Fort Gibson units; and also acquired lands, easements, rights-of-way and constructed transmission lines, substations and facilities of such capacity and voltage to interconnect and make workable the three units (Fdgs. 8(d), (e), R. 120-21).[3]

Also prior to enactment of the Flood Control Act of 1941, the Authority issued revenue bonds in the amount of $10,000,000 to finance the construction of the Markham Ferry and Fort Gibson projects (Fdg. 8(b), R. 118), pledging as security for the payment of these bonds the revenues derived from its properties, *including vested water rights and franchise rights in the Grand River.*

The Authority, of course, never procured a license for the Fort Gibson project. It did, however, procure a license for the Markham Ferry project. (Fdg. 21(g),

[3] The size of the transmission lines constructed prior to the taking by the United States of the Fort Gibson Dam site were of such size (110 Kv.) as to adequately transmit the power to be created at the two downstream damsites. (Exhibit A to Petition at R. 6A; see also, R. 77-78).

R. 129). The licenses issued by the Federal Power Commission to the Authority for the Pensacola and Markham Ferry projects retained in the United States no control whatsoever in or over the power pools of these projects. The storage and discharge in the reservoirs above the power pools are under the direction of the Corps of Engineers, all of which was agreed to by the Authority before the licenses were issued. (Fdg. 8(c), R. 119-20; Fdg. 21(g), R. 129; Fdg. 22, R. 129-31).

The court below held that respondent was entitled to just compensation for both its water power rights at the Fort Gibson project and its exclusive franchise to develop electric power and energy at the Fort Gibson project. It has received no payment of any kind for these properties.[4]

Petitioner attacks the judgment of the Court of Claims on two grounds: (1) the Court of Claims erred in holding that respondent has a property inter-

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[4] The condemnation case covering the seventy acre tract, referred to by petitioner (Br. for the United States, p. 10), is still pending in the United States District Court for the Northern District of Oklahoma, and there is no overlap between the claim in that case and the claims in this case. The relocation of certain transmission lines and the acquisition of certain flowage rights (*ibid.*) were settled by agreement between the Authority and the Government and are not included in this suit.

The claim which the Authority made before the Federal Power Commission, alluded to by petitioner (Br. for the United States, pp. 10-11), likewise has no effect on any of the claims in this case. There, the Authority requested the Commission to assess the United States and charge it for the benefits accruing to the Fort Gibson project from the storage and headwater improvements at the Pensacola project. The Federal Power Commission declined to entertain the petition on the ground that it was without jurisdiction, and the Court of Appeals for the Tenth Circuit affirmed. Fdg. 20, R. 126-27; *Grand River Dam Authority* v. *Federal Power Commission*, 246 F. 2d 453 (10th Cir., 1957).

est in the waters of the Grand River; and (2) the Court of Claims erred in holding that the Government's dominant navigation servitude did not apply to the waters of the Grand River, a non-navigable stream.

SUMMARY OF ARGUMENT

I

At the time of the taking by petitioner, respondent, by legislative grant from the State of Oklahoma, was vested with the absolute right to use and control all of the water power rights in the Grand River, a non-navigable stream, together with the exclusive franchise to develop the same. Session Laws of Oklahoma, 1935, Chap. 70 Art. 4, p. 350 *et seq.*; *City of Tulsa* v. *Grand-Hydro,* District Court of Mayes County, Okl., Pl. Ex. 1, R. 91 at R. 101; *Grand River Dam Authority* v. *Grand-Hydro,* 335 U.S. 359, 363, *affirming, Grand River Dam Authority* v. *Grand-Hydro,* 200 Okla. 157, 201 P. 2d 225.

The State of Oklahoma had the power and authority to appropriate to and vest in respondent all of the water power rights in the Grand River, together with the exclusive franchise and right to develop the same. The deed from the United States to the Cherokee Nation, dated December 31, 1838 and recorded in Misc. Vol. 478, pp. 733-41 of the General Land Office, Department of the Interior, Washington, D. C., divested the United States of all its right, title and interest, if any, in and to the waters of the Grand River. Thereafter, the United States never had any claim either to the lands embraced by the deed or to any of the waters in the non-navigable streams flowing through those lands.

In any event, to the extent that any right, title or interest to the water power rights in the non-navigable

streams in those lands may have remained in the United States following the deed to the Cherokee Nation in 1838, the control of these rights was expressly turned over to the new State of Oklahoma by the United States by virtue of § 25 of the Act of April 26, 1906, 34 Stat. 137, 146.

The Constitution of Oklahoma, which was approved by the United States (Proclamation of Statehood No. 6869, November 16, 1907), placed the "Arid States Doctrine" of water law in effect in Oklahoma, through which flowed the Grand River. The people of the State of Oklahoma, acting through their legislature, had the right and power to appropriate to and vest in respondent the water power rights and franchise rights which were taken and destroyed by petitioner. *Murphy* v. *Kerr*, 296 Fed. 536 (D.N.M., 1923), *affirmed*, 5 F. 2d 908 (8th Cir., 1925); *Federal Power Commission* v. *Niagara Mohawk Power Corp.*, 347 U.S. 239, 252. This it did in the Act creating respondent. *City of Tulsa* v. *Grand-Hydro*, *supra* at R. 101; *Grand River Dam Authority* v. *Grand-Hydro*, *supra* at 363.

The water rights which were taken here are not rights to unappropriated waters, as suggested by petitioner. (Br. for the United States, p. 35). All rights to the waters of the Grand River had been "appropriated to and vested in the Grand River Dam Authority" and others by the State of Oklahoma (*City of Tulsa* v. *Grand-Hydro*, *supra* at R. 101), and there were no unappropriated waters in the Grand River at the time respondent built its dam at Fort Gibson.

II

The vested water rights of respondent in the Grand River are private property (*Federal Power Commission v. Niagara Mohawk Power Corp.*, *supra* at 246-47;

Murphy v. *Kerr, supra; Ickes* v. *Fox,* 300 U.S. 82, 95-96), and these property rights cannot be taken without payment of just compensation. *International Paper Co.* v. *United States,* 282 U.S. 399, 407; *United States* v. *Kelly* (reported with *United States* v. *Cress*), 243 U.S. 316.

Respondent's license and franchise is a property right, the taking of which also requires payment of just compensation. *International Paper Co.* v. *United States, supra* at 407; *Frost* v. *Corporation Commission,* 278 U.S. 515; *Jackson* v. *United States,* 103 F. Supp. 1019 (Ct. Cl., 1952); *United States* v. *Smoot Sand & Gravel Corporation,* 248 F. 2d 822, 828 (D.C. Cir., 1957). Indeed, this Court has required this very respondent, on an earlier occasion, to pay just compensation for the value of an exclusive right to develop a power site on the Grand River. *Grand River Dam Authority* v. *Grand-Hydro, supra.*

III

Congress has manifested a clear policy, in the Reclamation Act, the Federal Power Act, and the Flood Control Act, to recognize and respect rights to the use of water vested or accrued under state law. See, e.g., *United States* v. *Gerlach Live Stock Co.,* 339 U.S. 725. During its consideration of the Flood Control Act of 1941 (which authorized federal construction of the Fort Gibson Dam) Congress recognized that respondent had exclusive franchise and water power rights in the waters of the Grand River.

The absence of any provision in the Flood Control Act of 1941 expressly indicating that rights vested under state law would not be recognized reflects an intention on the part of Congress that respondent be

compensated for its rights which were taken or destroyed by the construction of the Fort Gibson Dam.

IV

In any event, the Constitution of the United States requires that just compensation be paid when property rights in the waters of a non-navigable stream are taken or destroyed. U. S. Const., amend. V; *United States* v. *Kelly, supra; United States* v. *Kansas City Life Ins. Co.*, 339 U.S. 799. This is to be distinguished from the situation in which property rights in the waters of a navigable stream are taken or destroyed. No compensation is required in the case of the navigable stream, since all who hold rights in navigable waters hold them subject to the dominant servitude of the United States. *United States* v. *Kansas City Life Ins. Co., supra.* Those who hold rights in and to the waters of a non-navigable stream are not subject to such a servitude, and where their property rights are taken, just compensation must be paid.

V.

Petitioner cites no cases to support its suggestion that the United States may, without payment of just compensation, take property rights in the waters of a non-navigable stream because those waters "directly and substantially" affect navigation and commerce in a navigable river. To those who hold vested rights in the waters of non-navigable streams, there has been no "ample notice over the years" that their property "is subject to a dominant public interest." *Cf., United States* v. *Kansas City Life Ins. Co., supra* at 808. Adoption of the standard urged herein by petitioner would cause untold havoc in innumerable instances to holders of such vested property rights.

It cannot be denied that the United States has the *power* to take property rights in the exercise of its powers over commerce and navigation. U. S. Const. art. 1, § 8, cl. 3. But when the United States takes rights over which it does not have a dominant servitude, it is subject to the requirements of the Fifth Amendment, which imposes upon it an obligation to pay just compensation.

ARGUMENT

I

The Right to the Use of the Waters in the Grand River Were Vested in Respondent by the State of Oklahoma and Those Waters Were Appropriated at the Time of the Taking Herein

A. *The Grant To Respondent.* Respondent was created by the Oklahoma Legislature for the development of hydro-electric power on the Grand River. Session Laws of Oklahoma, 1935, Chap. 70, Art. 4, p. 350 *et seq.* (Fdg. 4, R. 114). Among the powers, rights and privileges conferred upon respondent by the legislation creating it were the following:

> "(a) To control, store and preserve, within the boundaries of the District, the water of Grand River and its tributaries for any useful purpose, and to use, distribute and sell the same within the boundaries of the District;
>
> (b) To develop and generate water power and electric energy within the boundaries of the District * * * " (Fdg. 5, R. 115).

The courts of the State of Oklahoma have considered this statute and have determined that:

> "[N]o person, firm, or corporation other than the Grand River Dam Authority has acquired since statehood the right to appropriate any of the waters of Grand River to a beneficial use; that Art. 4 of

> Chap. 70 of the 1935 Session Laws of the State of Oklahoma, which became effective on the 29th day of July, 1935, appropriated to and vested in the Grand River Dam Authority the absolute right to control, store and preserve the waters of Grand River for the purposes set forth in said Act * * * ". *City of Tulsa* v. *Grand-Hydro, supra* at R. 101.

This vesting and appropriation in respondent was expressly recognized by the Supreme Court of the State of Oklahoma in *Grand River Dam Authority* v. *Grand-Hydro,* 200 Okla. 157, 201 P. 2d 225; and by this Court in *Grand River Dam Authority* v. *Grand-Hydro,* 335 U.S. 359, 363.

B. *The Interest Of The State Of Oklahoma.* Petitioner does not challenge the fact that the State of Oklahoma granted to respondent the use and control of the waters in the Grand River. Petitioner instead appears to contend that the State of Oklahoma did not have an interest in the waters of the Grand River, and accordingly could not give any interest in these waters to respondent. (Br. for the United States, pp. 37-39).

So certain is petitioner that respondent cannot show State ownership of the waters used by the Fort Gibson dam, that it has flung down the gauntlet. "The critical element", petitioner contends, "is the federal character of the property within the State before it became a state. It is on the basis of that postulate that the respondent must somehow show a grant from the Federal Government" (Br. for the United States, p. 41).

Respondent accepts this challenge.

All of the Grand River lies within that part of Oklahoma which, prior to statehood, was known as the Cherokee Nation, which in turn was a part of Indian

Territory. These lands were originally a part of the Louisiana Purchase. By a series of treaties[5] between the United States and the Cherokee Nation of Indians, agreement was reached for the removal of a majority of the Cherokees from their native lands to the Territory that was later to become known as the Indian Territory. Mills, *Lands of the Five Civilized Tribes* (1919) at 25-26. For consideration, including the relinquishment of their right and claims to their native lands, the United States issued a Patent and Deed to the Cherokee Nation, granting and conveying forever an area of land described therein which included the lands through which the Grand River flows. By the specific terms of this Patent and Deed, issued on December 31, 1838, the Cherokee Nation was "to have and to hold the same together with all the rights, privileges, and appurtenances thereto belonging to the Cherokee Nation forever." (Recorded in Misc. Vol. 478, pp. 733-41, Records of the General Land Office, Dept. of Interior). See, Mills, *op. cit. supra* at 26-28.

The United States did not reserve any right, title or interest in or to the non-navigable waters within the area of land conveyed to the Cherokees.[6] In spite of later agreements between the Cherokee Nation and the United States, which diminished the acreage originally conveyed, the title to the lands, which included the Grand River, were never changed.

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[5] These treaties have been discussed in *Eastern Band of the Cherokee Indians* v. *United States*, 117 U.S. 288.

[6] Any implied reservation of the water rights was to the Indians, not to the United States. See, *United States* v. *Powers*, 94 F. 2d 783, 785 (9th Cir., 1938), *affirmed*, 305 U.S. 527; *United States* v. *5,677.94 Acres of Land*, 162 F. Supp. 108, 116 n. 8 (D. Mont., 1958).

The Cherokee Nation, acting under the supervision of the United States Government, actively entered into and managed its affairs as a governmental entity until just prior to the time Oklahoma was admitted to statehood. By § 15 of the Act of March 3, 1893, 27 Stat. 612, the Cherokee Nation was authorized to allot the remaining lands which it held under the original Patent and Deed to its members in severalty; and subsequently, these lands, in fact, were so conveyed. See, Mills, *op. cit. supra* at 29. At no time did the lands which included the Grand River ever revert to the ownership or control of the United States; and at no time after the Patent and Deed of December 31, 1838 were any of the lands touching upon the Grand River in the public domain, nor were they public lands or federal non-"public" lands. (See, Br. for the United States, p. 41).

Here, then, is the "critical element", which petitioner has demanded as the "postulate" upon which the State's claim to ownership must be founded. Here is the direct chain of title, the "grant from the Federal Government", which petitioner has conceded is what is necessary to bear the burden of proving State ownership of the waters (See, Br. for the United States, p. 39).

The indisputable facts of history thus demonstrate that up to the time of Oklahoma's admission to statehood, the United States had divested itself entirely of any right, title or interest in and to the waters of the Grand River. To the extent that any right, title or interest to the waters in the non-navigable streams embraced by the lands of the Cherokee Nation may have remained in the United States, the control of these waters for power purposes was expressly turned over to the State of Oklahoma by the United States by

virtue of § 25 of the Act of April 26, 1906, 34 Stat. 137, "An Act to provide for the final disposition of the affairs of the five civilized tribes in the Indian Territory and for other purposes." Section 25 of that Act, which is set out in full as an Appendix to petitioner's brief, gave to power and light companies rights-of-way to build dams across non-navigable streams for the purpose of generating power.

The legislative history of this Act is illuminating. When it was originally introduced as H.R. 5976, 59th Cong., 1st Sess., it did not contain § 25. When the Bill reached the Senate, § 25 was placed into the Act. After some debate on the Senate floor (See 40 Cong. Rec. 3205), the all important proviso at the end of § 25 was offered as an amendment by Senator Clapp and was unanimously adopted. *Ibid.* That proviso read:

> "*Provided*, That all rights granted hereunder shall be subject to the control of the future Territory or State within which the Indian Territory may be situat[illegible]"

The House approved the conference report (H. Rep. No. 2347, Vol. 1, 59th Cong., 1st Sess.) which recommended acceptance of § 25, as amended. It is plain from the legislative history of this Act that it was the intent of Congress that the future State of Oklahoma was to control the waters of non-navigable streams used in the production of power from dams placed across such streams.

C. *The Appropriated Waters of the Grand River.* Prior to admission to statehood, the Oklahoma Territory (as distinguished from the Indian Territory) was governed by a Territorial Legislature. See Organic Act of May 2, 1890, 26 Stat. 81 (contained in Okla.

Stat. Annot. (1952)). In one of the sessions of that Legislature (1905), there was adopted a series of Acts compiled in the statutes of the Oklahoma Territory under a chapter entitled "Irrigation". See historical note following § 3929 in the Compiled Laws of Oklahoma of 1909. This was the genesis of the "Arid States Doctrine" as it applies to Oklahoma. Most of these early statutes were carried forward when Oklahoma was admitted to statehood[7] and appear today in the Oklahoma Code Annotated, Title 82, and form a part of the "Water Code" of the State. This Water Code provides for the appropriation of water in non-navigable streams and establishes the machinery whereby such appropriation for beneficial use may be accomplished and adjudicated.

Under the Water Code, the State has asserted its right to control the manner in which the water of the State's non-navigable streams may be utilized. See, *Grand River Dam Authority* v. *Grand-Hydro*, 192 Okla. 693, 139 P. 2d 798.[8] The procedure it establishes is the law of Oklahoma; and it applies to all who seek

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[7] The Oklahoma Territory and the Indian Territory were admitted into the Union as the State of Oklahoma pursuant to the Enabling Act of June 16, 1906, 34 Stat. 267; the Constitution of the State was adopted by popular vote; the Proclamation of Statehood was issued (No. 6869, contained in Okla. Stat. Annot. (1952) Const., p. 405); and Oklahoma became a state on equal footing with the original states on November 16, 1907. Section 2 of the Schedule to the Oklahoma Constitution (Okla. Stat. Annot. (1952) Const., p. 583) provided that the laws in force in the Oklahoma Territory were to be carried forward and be in full force and effect at the moment of statehod.

[8] In *Murphy* v. *Kerr*, 296 Fed. 536 (D.N.M., 1923), *affirmed*, 5 F. 2d 908 (8th Cir., 1925), the Court said:

> "Water running in a natural stream belongs to the public. By statutory enactment the states of Arizona, Colorado, California, Montana, Nevada, New Mexico, *Oklahoma*, Oregon, North Dakota, South Dakota, Texas, Utah, Wyoming, and

the beneficial use of the waters of non-navigable streams.[9]

The legislation which created respondent, in practical effect, made an exception to the appropriation procedure provided by the Water Code. Instead of requiring respondent to follow the procedure outlined in the Water Code, the Oklahoma Legislature directly vested in respondent the right to the use of the waters of the Grand River. The courts of Oklahoma have so held. *City of Tulsa* v. *Grand-Hydro, supra* at R. 101.

The technique which the State of Oklahoma employed to vest in respondent the right to control, store and preserve the waters of the Grand River is without significance for purposes of this case. What is significant is that by the statute creating respondent, all of the rights to the use of the water in the Grand River were vested in respondent.

Thus, the water rights which were taken by petitioner, were *not* rights to *unappropriated waters*, as

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Idaho have declared in substance that all waters within the state are the property of the public, or belong to the state. The modern expression is that such waters are owned by the state in trust for the people." (Emphasis added). 296 Fed. at 540.

[9] Petitioner has set out, in a footnote at p. 30 of its brief, the full text of 60 Okla. Stat. Annot. (1949), Sec. 60, for the purpose, apparently, of indicating that the appropriation doctrine in Oklahoma is not entirely pure. Whether or not this is so seems entirely irrelevant. See, *United States* v. *Gerlach Live Stock Co.*, 339 U.S. 725.

It is also irrelevant that the State of Oklahoma may have changed from the riparian doctrine to the appropriation doctrine at or about the time of its Admission to Statehood (See, Br. for the United States, pp. 41-42). Certainly, a change from the riparian to the appropriation doctrine could not have operated to divest the federal government of its riparian rights (See, Br. for

petitioner suggests (Br. for the United States, p. 35). At the time petitioner built its dam at Fort Gibson, all rights to the waters of the Grand River had been appropriated and were actually being put to beneficial use. In consequence, and contrary to the contentions of petitioner, the only issue in this case is as to waters which have been appropriated.

* * * * *

It is respectfully submitted that the State of Oklahoma had the power and the authority to, and in fact did, appropriate to and vest in respondent all of the water rights in the Grand River, together with the exclusive franchise and right to develop the same; and that, at the time of the taking by petitioner herein, the waters of the Grand River at the Fort Gibson site were appropriated waters under the absolute control of respondent.

II

The Vested Water and Franchise Rights in the Grand River Were the Private Property of Respondent at the Time of the Taking Herein and Just Compensation Must Be Paid

A. *The Water Rights.* The holdings of this Court, as well as the uniform holdings of other courts, make it plain that rights to the use of running water are determined by state law. See, e.g., *Federal Power Commission* v. *Niagara Mohawk Power Corp.*, 347 U.S. 239, where this Court said: "[W]ater rights, like other real property rights, are determined by state law. Title to them is acquired in conformity with that

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the United States, p. 41) since, as the history set out at pp. 12-13, *supra*, indicates, the federal government had no riparian rights to be divested of. Furthermore, there would be nothing to preclude Oklahoma from changing from one doctrine to the other. See *Baumann* v. *Smrha*, 145 F. Supp. 617, 624 (D. Kan., 1956) (and cases cited), *affirmed*, 352 U.S. 863.

law." 347 U.S. at 252; accord, *United States* v. *Gerlach Live Stock Co.*, 339 U.S. 725, 742; *Ickes* v. *Fox*, 300 U.S. 82, 95; *Hardin* v. *Jordan*, 140 U.S. 371; *Murphy* v. *Kerr*, 296 Fed. 536, 540 (D. N.M., 1923), *affirmed*, 5 F. 2d 908 (8th Cir., 1925); *Rank* v. *Krug*, 90 F. Supp. 773, 786 (S.D. Cal., 1950) and cases cited at 785.

This Court has recognized on innumerable occasions that where state law grants a property right in and to the use of waters of a running stream, such a property right must be recognized in determining just compensation for the taking thereof. *International Paper Co.* v. *United States*, 282 U.S. 399, 407; *United States* v. *Kelly*, 243 U.S. 316; *Federal Power Commission* v. *Niagara Mohawk Power Corp., supra.* And this principle does not depend upon whether the right to use the waters of a running stream is acquired by virtue of the riparian doctrine (*Federal Power Commission* v. *Niagara Mohawk Power Corp., supra*) or under the doctrine of appropriation (*Ickes* v. *Fox, supra*) or, indeed, by a mixture of the two. *United States* v. *Gerlach Live Stock Co., supra.* It is the right to the use of the waters which is recognized, and the legal basis upon which the right may have been acquired is quite irrelevant.

It is clear from the discussion in Part I, pp. 10-14, *supra*, that respondent was vested, by the State of Oklahoma, with the right to the use and control of the waters in the Grand River; and that the State of Oklahoma had the power and authority to vest these water rights in respondent. And there is an unequivocal declaration by the Oklahoma courts that the waters in question were in fact appropriated to and vested in the Grand River Dam Authority. *City of Tulsa* v. *Grand-Hydro, supra* at R. 101. In conse-

quence, there can be no doubt that respondent had vested water rights in the Grand River at the time the United States built the Fort Gibson Dam, and that the construction of that Dam took or destroyed the private property of respondent, thus entitling it to just compensation.

This issue has long been settled and certainly seems foreclosed by this Court's decision in *International Paper Co.* v. *United States, supra.* In that case, it will be recalled, the International Paper Company had been authorized, pursuant to the law of the State of New York, to draw a portion of the flow of the Niagara River from a still larger diversion authorized to the Niagara Falls Power Company. During World War I, the Secretary of War directed the Power Company to take all of the flow and utilize energy therefrom for certain named companies whose work was deemed more useful for national defense purposes than that of the Paper Company. The consequence was that the Paper Company lost its rights to that portion of the flow of the River which it had had theretofore. This Court, in holding that the Paper Company was entitled to just compensation, expressly noted:

> "The petitioner's right was to the use of the water; and when all the water that it used was withdrawn * * * and turned elsewhere by government requisition for the production of power it is hard to see what more the Government could do to take the use." 282 U.S. at 407.

No valid distinction can be made between what occurred in the *International Paper Co.* case and what has occurred here. "There is no room for quibbling distinctions". 282 U.S. at 407. Respondent's "right

was to the use of the water" at the Fort Gibson site; and when all of this water which respondent was entitled to use was taken from it by the Government, "it is hard to see what more the Government could do to take the use." *Ibid.* As in *International Paper Co.*, respondent here was deprived of a valuable property right for which it is entitled to just compensation.

B. *The Franchise Rights.* There is no dispute that respondent held a franchise from the State of Oklahoma to develop and generate electric power and energy at the Fort Gibson site. There is also no dispute under the decisions of this Court, and the decisions of other courts, that such a franchise or license is a property right for the taking of which compensation must be paid. *Monongahela Navigation Co.* v. *United States*, 148 U.S. 312[10]; *Frost* v. *Corporation Commission*, 278 U.S. 515; *International Paper Co.* v. *United States*, 282 U.S. 399; see also *Jackson* v. *United States*, 103 F. Supp. 1019 (Ct. Cl., 1952); *cf.*, *Southern Counties Gas Co.* v. *United States*, 157 F. Supp. 934 (Ct. Cl., 1958), *cert. denied*, 358 U.S. 815.

This specific issue has already been determined for all practical purposes by this Court. In *Grand River Dam Authority* v. *Grand-Hydro*, 335 U.S. 359, this Court had before it a dispute between the present

[10] The language of the court in the *Monongahela* case is particularly appropriate to the instant case:

> "And here it may be noticed that, after taking this property, the government will have the right to exact the same tolls the navigation company has been receiving. It would seem strange that if, by asserting its right to take the property, the government could strip it largely of its value, destroying all that value which comes from the receipt of tolls,

respondent and Grand-Hydro, a private corporation which had been given a state license to appropriate the waters of the Grand River for the development of hydro-electric power. After the license had been granted to Grand-Hydro, the Oklahoma Legislature created the Grand River Dam Authority, respondent herein, and granted to it the exclusive authority to develop the Grand River. This Court observed that "In effect, the petitioner [the Authority] thus acquired a state priority over the respondent [Grand-Hydro], although the respondent held title to certain water rights and to the land needed for the project." 335 U.S. at 363. The specific issue before this Court in the *Grand-Hydro* litigation was whether, in determining the value of certain land which the Authority had taken over from Grand-Hydro, it was appropriate to consider the value of that land for power site purposes. This Court affirmed the decision of the Supreme Court of Oklahoma which had held that it was necessary to consider the value of the land as a power site.

This Court has thus settled the issue of whether a permit or franchise to generate electric power and energy from the waters of the Grand River is a property right; and certainly, this property right is no different when it belongs to the Grand River Dam Authority than when it belonged to Grand-Hydro.

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and having taken the property at this reduced valuation, immediately possess and enjoy all the profits from the collection of the same tolls. In other words, by the contention this element of value exists before and after the taking, and disappears only during the very moment and process of taking. Surely, reasoning which leads to such a result must have some vice, at least the vice of injustice." 148 U.S. at 337-38.

Petitioner argues that the claim for the value of the franchise right does not give rise to a right of compensation since it "is no more than a claim that a prospective business opportunity was lost" (Br. for the United States, p. 34), and only "a hope or expectancy" was destroyed (Br. for the United States, p. 28). But this argument disregards the established facts of record. While concededly respondent had not begun physical construction of the Fort Gibson project before petitioner built the project, it had taken many of the steps preliminary thereto. It had developed a comprehensive plan in which the Fort Gibson project played an important role. It had constructed and placed in operation the Pensacola unit which was the largest and the key unit to the operation of the units downstream. It had acquired lands, easements, and rights-of-way, and had constructed transmission lines, substations and facilities to intercommunicate the Fort Gibson project with the Pensacola project and the Markham Ferry project. (Pp. 3-4, *supra*).

By the time of the taking herein, respondent had already been making beneficial use of the water rights in the Grand River, had developed and had in operation a going concern, had pledged the revenues from the water rights and franchise rights in the Grand River for the payment of revenue bonds, and had spent millions of dollars in providing facilities to make beneficial use of the water and franchise rights.

It is hardly appropriate to characterize the Authority's loss as being one of "prospective business opportunity", or the destruction of "a hope or expectancy". Respondent's loss was exactly what the Court of Claims held it to be—that of "property

rights which could not be taken without just compensation". (R. 109).

In any event, a similar argument was made and rejected in the *Grand-Hydro* case, *supra*. There it was contended that since Grand-Hydro had not procured a license from the Federal Power Commission, the rights granted to it by the State had not become sufficiently real to justify payment for its claimed franchise right. 335 U.S. at 372. This argument was rejected by the Supreme Court of Oklahoma and by this Court. *Ibid.* The *Grand-Hydro* case thus stands with other decided cases, *supra*, as holding that the franchise right to harness the waters of a flowing stream in order to produce electric power is a property right entitled to the protection of the Fifth Amendment.[11]

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[11] Petitioner refers to certain sections of the Act establishing the Grand River Dam Authority and suggests that this Act contemplated that the development of the dams on the Grand River would be a cooperative effort of the Authority and the United States (Br. for the United States, p. 34, n. 17). From this it concludes that the federal construction of the Fort Gibson project did not frustrate either the state or federal objectives.

Petitioner, however, misconstrues the language of § 862(c) (set out in Br. for the United States at p. 4). The so-called "cooperative language" was solely for the purpose of insuring that the operation of the dams for flood control purposes would be done under the supervision of the Corps of Engineers. This in fact was provided for in the licenses issued by the Federal Power Commission for the operation of the Pensacola and Markham Ferry projects (Fdg. 8(c), R. 119; Fdg. 22, R. 129-31).

III

In the Flood Control Act of 1941, Congress Manifested No Intention to Depart From Its Long Established Policy to Recognize and Respect Rights to the Use of Water Vested Under State Law

Nothing contained in the Flood Control Act of 1941, which provided for the construction of the Fort Gibson Dam, indicates an intention by Congress to depart from its well established policy to recognize and respect rights to the use of water vested or accrued under state law.

In § 8 of the Reclamation Act of June 17, 1902, 43 U.S.C. 383, 32 Stat. 390, Congress expressly provided:

> "Nothing in this chapter shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water * * * or any vested right acquired thereunder * * *."

Similarly, in Section 27 of the Federal Power Act of June 10, 1920, 16 U.S.C. 821, 41 Stat. 1077, Congress expressly provided:

> "Nothing contained in this chapter shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use or distribution of water * * * or any vested right acquired therein."

Finally, in the Flood Control Act of December 22, 1944, 33 U.S.C. 701-1, 58 Stat. 887, Congress expressly provided:

> "* * * [I]t is declared to be the policy of the Congress to recognize the interests and rights of the States * * * to preserve and protect to the

fullest possible extent established and potential uses, for all purposes, of the waters of the Nation's rivers * * *."

These Acts—all dealing with problems relating to reclamation, the generation of power, and flood control—manifest a deep rooted concern on the part of Congress with respect to rights vested under the laws of any state. A reversal of this policy should not be lightly imputed.

Although Congress did not expressly set forth a declaration similar to those quoted above when it enacted the Flood Control Act of 1941, it did indicate that the Fort Gibson Dam was to be constructed in accordance with House Document 107 of the 76th Congress, First Session. That Document clearly indicated a recognition by Congress that the State of Oklahoma had established respondent and had granted to it rights with respect to the development and sale of power from the Grand River. So, for example, the Chief of Engineers, stated:

"* * * Local interests desire construction of reservoirs on the lower Grand (Neosho) River at the Pensacola, Markham Ferry and Fort Gibson sites for the production of hydroelectric power and for flood control. The desired improvements, particularly with respect to the development of water power, are proposed by the State of Oklahoma which, through legislative enactment, has created a Conservation and Reclamation District known as the Grand River Dam Authority, this authority established primarily for the development and sale of power from improvements on Grand River. * * *" House Doc. No. 107, 76th Cong., at p. 103.

The same Document further stated:

> "* * * It is noted that development of the Pensacola site for power development and flood control is planned by the Grand River Dam Authority, a Conservation and Reclamation District, created by the State of Oklahoma primarily for the development and sale of power from the Grand River. The work is being financed by a loan and grant obtained from the Federal Emergency Administration of Public Works." House Doc. No. 107, 76th Cong., at p. 104.

And the District Engineer reported:

> "In 1935 the State of Oklahoma created the Grand River Dam Authority. Legally this Authority has the right to issue bonds for the construction of power development on Grand River, but the Act prohibited the Authority from distributing power to the consumer. The 1937 Oklahoma Legislature removed this restriction. The Authority has been actively interested in this project and obtained, through the National Resources Committee, a report on the social and economical aspects of the Pensacola project, together with a preliminary analysis of the power market applicable to this project. Said report was published as Flood Control Committee Document No. 4, 74th Congress, 1st Session. Its general tenor was favorable. A loan and grant has been made by the Public Works Administration to the Grand River Dam Authority for the development of the Pensacola project." House Doc. No. 107, 76th Cong., at p. 9.

Accordingly, it seems clear that when Congress authorized the construction of the Fort Gibson dam in the Flood Control Act of 1941, it did so with the knowledge that this respondent held the franchise and water power rights to develop the water power

of the Grand River and that respondent had actually completed one of the units (Pensacola).

Moreover, Congress has also recognized and compensated the City of Muskogee, Oklahoma, for water rights in the Grand River which were destroyed or damaged as a result of the construction of the Fort Gibson Dam. Act of August 26, 1954, Public Law 663, 83rd Congress, 63 Stat. 822.[12]

Under the expressed policy of Congress as set out in the Reclamation Act, the Federal Power Act and the Flood Control Act—and there being nothing to the contrary in the Flood Control Act of 1941—it is not inappropriate to attribute to Congress an intention that respondent would be compensated for any of its vested rights which were destroyed or damaged as a result of the construction of the Fort Gibson Dam.

IV

Petitioner Must Pay Just Compensation for the Property Rights It Has Taken From Respondent

The question presented in this case is whether respondent's vested water and franchise rights, acquired under state law, in a non-navigable stream can be taken or destroyed by the United States without the payment of just compensation.

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[12] Public Law 663, Chap. X, p. 22, states:

"For contribution to the City of Muskogee toward the construction of a water supply pipeline from existing city water supply intake on Grand River near its junction with the Arkansas River to Fort Gibson dam, in settlement of all *damages to the water supply* of the City of Muskogee, on account of the construction and operation of Fort Gibson Reservoir, $200,000.00 out of funds previously appropriated." (Emphasis added).

Preliminarily, it should be noted that respondent concedes that the United States has the *power*, under the Commerce Clause of the Constitution, to take or destroy water rights in non-navigable streams, including those which respondent has in the Grand River. But the issue in this case is not one of *power*, but rather of *compensation*. And respondent strenuously contends—and the Court of Claims has held—that when the United States exercises its power to take property rights in non-navigable streams, it can do so only upon payment of just compensation.

The holding of the Court of Claims on this question is neither novel nor new; on the contrary, it is entirely consistent with established decisions. *United States* v. *Kelly* (reported with *United States* v. *Cress*), 243 U.S. 316; *Iowa-Wisconsin Bridge Co.* v. *United States*, 84 F. Supp. 852, 857, 867 (Ct. Cl., 1949), *cert. denied*, 339 U.S. 982; see, *United States* v. *5,677.94 Acres of Land*, 162 F. Supp. 108, 112 (D. Mont., 1958).

In the *Kelly* case, this Court held that where the United States, by the erection of a dam on a navigable river, affected the flow of water in a non-navigable tributary so as to make it impossible to operate the respondent's mill, it was required to pay just compensation. This case is even stronger than *Kelly*. In *Kelly*, the Government's activities were confined to navigable waters but affected respondent's property in the non-navigable tributary. Here, by contrast, the Government's activities were themselves in the non-navigable river and directly destroyed respondent's rights. If the payment of just compensation

was necessary in the *Kelly* case, it is *a fortiori* required here.[13]

The distinction between what the Government may take without compensation and what it may take only upon payment of just compensation, has been, we submit, plainly delineated in this Court's decisions. The governing principal is that water rights in navigable streams are inferior to, and subject to, the superior navigation easement of the federal government; and thus, such water rights may be taken or destroyed by the Government without compensation. *United States* v. *Chandler-Dunbar Water Power Company*, 229 U.S. 53; *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288; *United States* v. *Appalachian Electric Power Co.*, 311 U.S. 377.

The touchstone in all of these cases is the paramount servitude of the federal government. This

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[13] Petitioner's efforts to attenuate the holding in the *Kelly* case (Br. for the United States, pp. 26-28) are ingenuous but unavailing. Despite its suggestion that the decision has all but been overruled (Br. for the United States, p. 27), this Court has expressly declined to do so. *United States* v. *Willow River Power Co.*, 324 U.S. 499, 506-07.

That *Kelly* involved an award of only $1,500 (Br. for the United States, p. 26), does not make it any the less binding since constitutional principles plainly do not vary with the amount of money involved.

And that Kelly was a riparian owner does not make his position stronger than respondent's here. Respondent's right to the use of the waters of the Grand River were vested under the law of Oklahoma and are entitled to the same constitutional protection as Kelly's rights which were derived under the law of Kentucky.

The suggestion that Kelly's mill had been in operation when its utility was destroyed by the United States and that respondent here had only "a hope or expectancy" (Br. for the United States, pp. 27-28) is a distinction which does not comport with the facts of record in this case (pp. 21-22, *supra*).

servitude is limited to the bed and banks of navigable streams, and properties within the bed and banks of navigable streams may therefore be taken or destroyed without compensation. But the superior right of the United States has never been held to extend *beyond* the bed and banks of the navigable streams, and when property outside the bed and banks of navigable streams is taken, just compensation must be paid.

This proposition has been very clearly expressed by Justice Burton, speaking for the Court, in *United States* v. *Kansas City Life Ins. Co.*, 339 U.S. 799:

> "It is not the broad constitutional power to regulate commerce, but rather the servitude, derived from that power and narrower in scope, that frees the Government from liability in these cases. When the Government exercises this servitude, it is exercising its paramount power in the interest of navigation, rather than taking the private property of anyone. The owner's use of property riparian to a navigable stream long has been limited by the right of the public to use the stream in the interest of navigation. See Gould on Waters, c. IV, §§ 86-90 (1883); I Farnham, Waters and Water Rights, c. III, § 29 (1904). This has applied to the stream and to the land submerged by the stream. There thus has been ample notice over the years that such property is subject to a dominant public interest. This right of the public has crystallized in terms of a servitude over the bed of the stream. The relevance of the high-water level of the navigable stream is that it marks its bed. *Accordingly, it is consistent with the history and reason of the rule to deny compensation where the claimant's private title is burdened with this servitude but to award compensation where his title is not so burdened.*" (Emphasis added). 339 U.S. at 808.

Since the Grand River is concededly a non-navigable stream, under the criterion set forth in the *Kansas City Life Ins. Co.* case, its bed and banks were not burdened with a dominant servitude running to the United States. In consequence, at the time respondent was vested with all of the water power and franchise rights in the Grand River at the Fort Gibson site, its property interests were not burdened by any federal servitude. It follows then that when the United States constructed the Fort Gibson project, it could not avail itself of the servitude which it could have only on a navigable river. Though it had the power to take respondent's water and franchise rights, it could take them only subject to the limitations imposed by the Fifth Amendment.

Contrary to petitioner's contention (Br. for the United States, p. 18), it has no "federal prerogatives" by virtue of its "commerce power". The commerce power gives it only a paramount servitude over the bed and banks of a *navigable* river; it gives no servitude over the bed and banks of a *non-navigable* river. And absent the servitude, the taking by petitioner is a taking subject to the Fifth Amendment and only upon payment of just compensation.

V

There Is No Support in the Cases for Petitioner's Claim That Its Dominant Servitude Extends to Non-Navigable Rivers, and Adoption of That Standard by This Court Can Cause Havoc With Vested Property Rights

Petitioner apparently recognizes that it cannot prevail in this case under established law. Perhaps this recognition accounts for petitioner's assertion that the question is "not whether the Grand River is navigable but whether it directly and substantially affects

navigation and commerce in the Arkansas River Basin." (Br. for the United States, p. 13; see also, p. 20). Such audacity is rare even for the Government—it is an effort to extend its dominant servitude, hitherto limited to the bed and banks of a navigable river, into non-navigable tributaries of those rivers.

Petitioner does not—and indeed cannot—cite any cases to support this extraordinary assertion. The decision in *United States* v. *Twin City Power Co.*, 350 U.S. 222, is, as petitioner concedes (Br. for the United States, p. 19), a decision which deals with a *navigable* river (the Savannah River). Petitioner also concedes that the Court of Claims found this distinction significant. *Ibid.* It is to be noted that the Court of Claims is not alone in this regard. See, *United States* v. *5,677.94 Acres of Land*, 162 F. Supp. 108 (D. Mont., 1958), where the Court said: "It is my opinion that the rule of Twin City Power Co. case would in any event be limited in its application to a navigable stream." 162 F. Supp. at 116.

The decision in *United States* v. *Rio Grande Irrigation Co.*, 174 U.S. 690, is completely irrelevant to petitioner's assertion. In that case, the Attorney General of the United States, acting pursuant to a federal statute (which made it a criminal offense to create an obstruction "to the navigable capacity of any waters, in respect to which the United States has jurisdiction," and which authorized proceedings in equity to enjoin such obstructions), sought to enjoin a private company from constructing a dam across the Rio Grande River in the territory of New Mexico on the ground that such appropriation by the defendant would substantially interfere with the navigable capacity of the river in the downstream areas. This Court merely

sustained the right of the federal government to proceed in that fashion. No claim for compensation was involved.

Oklahoma v. *Atkinson*, 313 U.S. 508, is the other side of the coin. In that case, the state of Oklahoma sought to enjoin the construction of the Denison Dam on the Red River. The sole question determined by this Court in that case was that the Dam could be constructed pursuant to the power of the federal government to regulate commerce and navigation. Significantly, the opinion by Mr. Justice Douglas, for an unanimous Court, specifically pointed out:

> "There is no complaint that any property owner will not receive just compensation for the land taken." 313 U.S. at 534.

The reliance placed by petitioner on *Grand River Dam Authority* v. *Grand-Hydro*, 335 U.S. 359, is equally unavailing. It is significant that petitioner does not rely upon this Court's opinion in that case, but rather upon what petitioner there unsuccessfully asserted in its brief (Br. for the United States, pp. 22-25) and what the minority of the Court wrote in dissent (*Id.* at 25-26). We have discussed the *Grand-Hydro* case in detail (pp. 20-23, *supra*), and it is readily apparent that the *Grand-Hydro* case did not and indeed could not have determined the right of the United States to the waters of non-navigable streams, since no rights of the United States were involved in that case.[14]

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[14] The observation in the majority opinion that "The United States enjoys special rights and power in relation to navigable streams, and also to streams which affect interstate commerce" (335 U.S. at 373), was unnecessary to the decision of the case and is hardly support for petitioner's contention.

The fact of the matter is that never before has it been held that the federal government can take water rights in a *non-navigable* stream without paying compensation therefor. To embrace petitioner's audacious suggestion would be to wreak, in innumerable instances, untold havoc to holders of vested property rights and to open a Pandora's box of unending trouble. The test petitioner suggests (i.e., directly and substantially affecting navigation and commerce) would encompass almost any non-navigable stream. And, while it may not be important for this Court to concern itself with the vested rights which may exist on "every rivulet, creek, and stream" (*cf.*, Br. for the United States, pp. 23-24 n. 9), what of the rights which have vested in the more substantial, but nevertheless non-navigable, waters throughout the United States? In Oklahoma alone, the application of this doctrine would mean that the federal government could take and destroy the water rights of such cities as Tulsa and Muskogee, and of towns such as Fort Gibson, Wagoner and Pryor Creek (all determined in *City of Tulsa* v. *Grand-Hydro*, R. 91), without paying just compensation.

It is difficult to believe that the framers of our Constitution intended to immunize the federal government from the reach of the Fifth Amendment by such an extraordinary extrapolation of the commerce power.

It is not amiss to turn again to this Court's decision in *United States* v. *Kansas City Life Ins. Co.*, *supra*. There, it will be recalled, this Court justified the exercise of the Government's dominant servitude by noting that "[t]here thus has been ample notice over the years that such property is subject to a

dominant public interest." 339 U.S. at 808. But that was written with respect to the Government's rights over *navigable* waters. Not until the instant case has there ever been a claim by the federal government that its dominant servitude extended to the waters of *non-navigable* streams. There has been no "ample notice over the years" to the holders of vested water rights in non-navigable streams that their property "is subject to a dominant public interest." The standard now urged by petitioner is a belated, unjustified, unwarranted and utterly illegal effort to elude its constitutional obligation to make just compensation.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that the judgment below should be affirmed.

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